



DISPUTE RESOLUTION PROCESSES

Thinking through SGMA Implementation: A Water in the West Series

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Disclaimer

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INTRODUCTION

Groundwater serves as the primary water supply for more than two billion people worldwide (Famiglietti 2014) and supplies approximately 40% of irrigation water supply globally (Siebert et al. 2010). This heavy reliance on groundwater aquifers has led to the unsustainable depletion of groundwater resources at the regional and global scale resulting in an increasing number of conflicts over groundwater resources (Jarvis 2014). Similar to global trends, a long-term overreliance on groundwater in California has resulted in historically low groundwater levels in basins throughout the state. Groundwater level declines have had widespread impacts, including drying of domestic wells, land subsidence and the loss of supply wells.

In 2014, California passed the Sustainable Groundwater Management Act (SGMA) to address the impacts resulting from chronic groundwater overdraft in the state. SGMA requires formation of local Groundwater Sustainability Agencies (GSAs). GSAs must develop and implement Groundwater Sustainability Plans (GSPs, Plan) to achieve sustainability within 20 years of Plan implementation.¹ Achieving sustainability requires local agencies, stakeholders and water users to make many difficult and potentially contentious decisions such as regulating pumping, levying pumping fees and finding and purchasing alternative water supplies to meet legislated sustainability goals. These decisions are prone to conflict, particularly when pumping restrictions are viewed as infringing on property rights, or when fees are charged to support local management.

Traditionally, many of these decisions have been resolved through court adjudications, many of which have been long and expensive processes in California (Szeptycki et al. 2018) and elsewhere (USDA 2018). In recent decades, the Alternative Dispute Resolution (ADR) movement has fostered use of alternative processes, including direct negotiation among the parties, facilitation, mediation and arbitration in lieu of, or supplemental to, adjudication to resolve environmental conflicts. The U.S. Department of Agriculture (USDA) mediation program has the explicit goal of helping “avoid expensive and time-consuming administrative appeals and/or litigation” (USDA 2018). Other government departments like the Department of Energy and the U.S. Environmental Protection Agency also have mediation programs with similar goals.²

Many of the local GSAs established under SGMA are multi-entity GSAs formed through Joint Powers Authorities Agreements (JPAA) or through Memorandums of Understanding Agreements (MOUA) – we refer to these agreements collectively as “Agreements.”³ Additionally, the jurisdictional area of many GSAs does not span the entire groundwater basin. SGMA requires sustainability at the basin-scale, so many GSAs will need to collaborate internally (among member agencies within a GSA) and externally (with other GSAs in their basin) to develop and implement GSPs which are “together likely to achieve the groundwater sustainability goal for the basin,” (California Water Code (CWC) § 10733(b)).⁴

Newly formed GSAs have additional layers of potential conflict that may not be present in interpersonal or even other interorganizational contexts with well-established processes and precedents, including questions of who has the authority, what process(es) should be followed when exercising that authority and what the constraints on the exercise of that authority are. These questions are particularly pertinent when agencies with similar or overlapping authorities are working together – as is common

1 SGMA requires that GSPs be submitted to the Department of Water Resources by January 31, 2020 for critically overdrafted basins and by January 31, 2022 for all remaining high- and medium-priority basins (CWC § 10720.7(a)).

2 See: <https://www.energy.gov/oha/services/alternative-dispute-resolution/hq-mediation-program-workplace-conflicts> and <https://www.epa.gov/adr>, respectively.

3 Where there is a need to distinguish between Agreements for a Joint Powers Authority (JPA) or Memorandum of Understanding (MOU), we refer to these as JPAA and MOUA, respectively.

4 SGMA defines the groundwater sustainability goal as “the existence and implementation of one or more groundwater sustainably plans that achieve sustainable groundwater management by identifying and causing the implementation of measures targeted to ensure that the applicable basin is operated within its sustainable yield.” (CWC § 10721(u)).

practice under SGMA. Questions regarding authority, tight legal and regulatory timelines, a lack of existing precedents and the need to represent agency and constituent interests have the potential to exacerbate conflicts under SGMA. In some cases, where authoritative interpretations of legal authority and limits have not been established yet, litigation may be necessary and warranted.

When institutions have to coordinate and cooperate, as JPAs do, identifying processes and forums for resolving conflicts is crucial (Marta et al. 2014). However, developing effective mechanisms for resolving conflicts and using them can be challenging. Learning from the experiences of past water management agencies in California, as well as the natural resource conflict resolution literature more broadly, may help GSAs develop robust dispute resolution plans with processes to incentivize and streamline their resolution.

RESEARCH MOTIVATION

Thus far, 74 multi-entity GSAs have formed via JPAAs or MOUAs. This research assesses the Agreements of those 74 multi-entity GSAs, along with semi-structured interviews and email correspondence, to answer the following research questions:

1. Who is included in the GSA decision-making body and how are decisions amongst them to be made?
2. To what extent do the Agreements include a clause related to dispute resolution and what is the range of procedures that these clauses address?
3. What can be learned from the experience of other, non-SGMA water management agencies and from the environmental conflict resolution literature regarding how dispute resolution clauses have been invoked or ignored and how useful they have been in practice?

More than one-third (30) of the multi-entity GSAs are located in critically overdrafted basins and are in the process of developing their GSPs and coordination agreements to meet the January 31, 2020 deadline for GSP submission. The appearance and content of dispute resolution provisions in the coordination agreements may be a focus for later research.

METHODS

All 74 Agreements for multi-entity GSAs were coded for a variety of factors relating to GSA governance and decision making. These factors included: the number of member agencies; board members and non-voting members; agency voting structure and processes, including what decisions require greater than majority votes; member powers; agency financing and the presence or absence of a dispute resolution clause; and if present, the process(es) for resolving disputes.

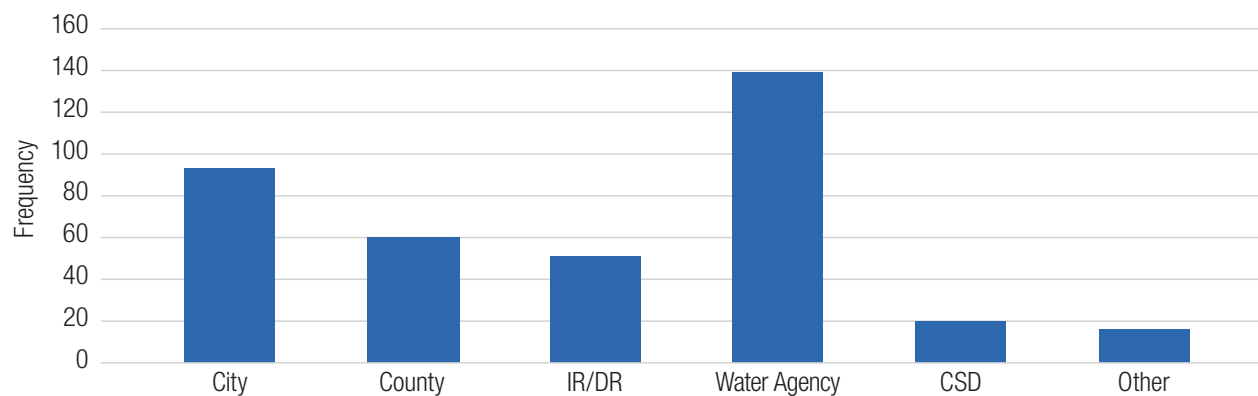
In addition to document analysis, we conducted 11 interviews or exchanges of correspondence with lawyers and water managers involved in long-standing water management arrangements (e.g., Santa Ana Watershed Project Authority (SAWPA)), as well as recently formed GSAs to understand the factors influencing the decision to include a dispute resolution clause in their agency's agreement and to use it. In the case of long-standing water management arrangements, we were interested in understanding the extent to which existing dispute resolution clauses had been used and the circumstances surrounding their use. Interviews with water managers or lawyers involved in multi-entity GSAs focused on understanding the factors that influenced their decision to include a dispute resolution clause in their Agreements.

RESULTS AND DISCUSSION

Multi-entity GSA Representation and Voting Structures

Of the 74 Agreements included in our analysis, 40 (54%) were JPAAAs, while the remaining 34 (46%) were MOUAs (Table 1). The total number of member agencies in all Agreements varies widely between a minimum of two members and a maximum of 19 members, with a tendency toward more member agencies in the JPAAAs (an average of 6.0 members versus 4.1 members in MOUAs) (Table 1). Member agencies are most commonly composed of water agencies,⁵ cities, counties, irrigation or reclamation districts, community service districts and others⁶ (Figure 1). On average, the governing boards of the GSAs have 2.3 more seats than the number of member agencies – additional board members include agricultural and environmental interests, water supply companies, representatives for private pumpers and unmanaged areas⁷ and others. Only one Agreement included a board seat for Tribal representation. Eight (13%) of the Agreements include one or more non-voting members. Non-voting members include counties, water agencies and districts, cities, community service districts and federal entities.

Figure 1. The frequency of multi-entity GSA member categories. ID/RD is irrigation districts and reclamation districts and CSD is community service districts. The “other” category includes multiple resource conservation districts, a hospital, a cemetery district, a lake drainage district, a water quality coalition, multiple utility districts and one tribe.



5 The term water agencies is used here to encompass a breadth of water districts and agencies, including water districts, water agencies, flood control and water conservation districts, water companies, water conservation districts, waterworks districts, departments of water and power, water authorities, water storage districts, water divisions, water and sanitation districts, mutual water companies and stormwater districts.

6 The “other” designation includes: multiple resource conservation districts, a hospital, a cemetery district, a lake drainage district, a water quality coalition, multiple utility districts and one tribe.

7 Unmanaged portions of a basin are commonly referred to under SGMA as “white spaces.” See: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/Sustainable-Groundwater-Management/Groundwater-Sustainability-Plans/Files/GSP-Topic-Papers/SGMA_GSP_Topic-5_Boundaries_Overlapping_Fringe_Areas_080315.pdf.

Whether and how to include additional entities and/or non-voting members in a GSA's governance structure has complicated implications for dispute resolution. When entities, stakeholders or others do not feel represented in a process, have no control or lack decision-making authority (due to being excluded from the decision-making process or because their vote is insufficient to modify decisions), they may feel their only option to resolve disputes is through the courts. Additionally, agreements that include dispute resolution clauses should consider who can participate in these processes and whether parties external to the agreement can trigger an alternative dispute resolution process. Agreements with non-voting members, members that have insufficient representation in their voting structures or that do not allow stakeholder groups a voice in their process may be vulnerable to litigation, as parties feel this is their only means of being represented in the process.

Table 1. Overview of the number of member agencies, board members and voting structures for all Agreements categorized by JPAA, MOUA and total.

	JPAA (number, %)	MOUA (number, %)	Total (number, %)
Agreements	40 (54)	34 (46)	74
Member agencies	Min: 2	Min: 2	Min: 2
	Max: 19	Max: 11	Max: 19
	Mean: 6.0	Average: 4.1	Mean: 5.1
Board members*	Min: 2	Min: 2	Min: 2
	Max: 24	Max: 11	Max: 24
	Mean: 8.3	Average: 5.6	Mean: 7.4
Voting Structure**	Equal: 35 (88)	Equal: 14 (70)	Equal: 49 (82)
	Weighted: 1 (2)	Weighted: 4 (20)	Weighted: 5 (8)
	Other: 4 (10)	Other: 2 (10)	Other: 6 (10)

* All JPAA's have a designated Board of Directors; 8 MOUAs do not.

** All JPAA's have voting structures in their agreements; 14 MOUAs do not.

Once GSA membership has been established, decision-making is done through established voting structures (i.e., who is entitled to vote on what issues, with what level of support). Since JPAAAs create a new body, all JPAAAs include clauses outlining voting structures. By contrast, 14 (41%) of the 34 of the MOUAs do not include voting structures. Of the Agreements with voting structures (JPAAAs and MOUAs combined), 83% have equal voting structures, defined as one vote per board seat.⁸ Five Agreements have voting structures weighted by agency type (four) or agency size (one).

Nearly all Agreements (92%) require a greater than majority vote for certain categories of decisions. These categories include but are not limited to: amendment of the agreement including changes to membership, member termination or changes in voting structure; budget approval; levying fees; GSP approval; imposing pumping restrictions; adoption of rules or ordinances and incurring debt. These kinds of decisions may be perceived as “sensitive” and require additional board-level support than majority voting provides. This may itself be a form of conflict mitigation, i.e., identifying types of decisions that are likely to be intensely contentious and shifting them to processes that require higher levels of consensus before a decision can be taken.

Dispute Clauses in the Multi-entity GSA Agreements

Our analysis assesses the presence or absence of dispute resolution clauses in the existing multi-entity GSA Agreements. It is important to note that dispute resolution clauses are NOT required in these agreements, and approximately one-third of multi-agency GSAs have chosen not to include them.

Our purpose in reviewing the dispute resolution clauses included in the multi-entity Agreements is not to evaluate them, but to provide information on the types of disputes and processes that agencies chose to include in their formation agreements. This review has the goal of providing information for GSAs working in basins with multiple GSPs, and the individuals or entities supporting them, as they draft the dispute resolution clauses in coordination agreements required under California Code of Regulations, Title 23 § 375.4(b)(2). It may also be the case that multi-agency GSAs may opt to reconsider their decisions to include or forego dispute resolution clauses in their founding agreements.

We coded dispute resolution clauses in the Agreements for the following variables: (1) the presence or absence of a dispute resolution clause; (2) if there are limitations on the type of dispute or individuals that can be included in the dispute resolution process and (3) whether a process for resolving disputes is proposed and if so, whether it includes specifics on mechanisms, timelines or funding for the process.

Frequency of dispute resolution clauses. The majority of Agreements (64%) include dispute resolution clauses, indicating that many participants in the formation of multi-entity GSAs see value in these clauses. JPAAAs and MOUAs were equally likely to include dispute resolution clauses, although there are some distinctions between JPAAAs and MOUAs with regard to the contents and coverage of the clauses.

⁸ Note that some Agreements have multiple entities sharing one “representative” seat or give two board seats to member agencies and one board seat to additional member agencies. While this configuration represents a “weighting” of representation, each individual seat gets one vote. Thus, Agreements with shared seats were coded as having equal voting structures.

Table 2. Dispute resolution (DR) clause elements in multi-entity GSA Agreements categorized by JPAA, MOUA and total.

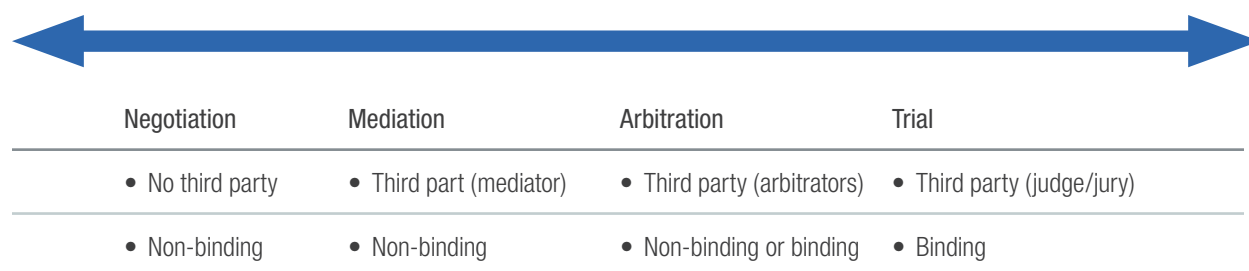
Dispute Resolution (DR) clause elements	JPAA (number, %)	MOUA (number, %)	Total (number, %)
The DR clause specifies:			
The type of disputes that can be included	Yes: 20 (80) No: 5 (20)	Yes: 12 (55) No: 10 (45)	Yes: 32 (68) No: 15 (32)
Who can invoke the process	Yes: 15 (60) No: 10 (40)	Yes: 8 (36) No: 14 (64)	Yes: 23 (49) No: 24 (51)
Who will pay for the process	Yes: 19 (76) No: 6 (23)	Yes: 3 (14) No: 19 (86)	Yes: 22 (46) No: 25 (54)
A timeline for the DR process	Yes: 16 (64) No: 9 (36)	Yes: 4 (18) No: 18 (82)	Yes: 20 (43) No: 27 (57)
A DR process	Yes: 24 (96) No: 1 (4)	Yes: 18 (82) No: 4 (8)	Yes: 42 (89) No: 5 (11)

Purposes of dispute resolution clauses. Disputes over groundwater can involve a plethora of parties from the public, private and non-profit sectors. There are a variety of process options that have been developed for resolving conflicts that encompass different participants, goals and inputs and achieve different outcomes. The many possible goals include the importance of efficiency of time and money, quality of the process and outcome, community involvement, focus on legal rights versus underlying interests and access to justice. Ideally dispute resolution clauses will be crafted with agency goals at the fore. However, in some circumstances, agreements may include dispute resolution clauses that have not been tailored to their agency's needs, goals or expected uses. In such cases, it is unclear whether these clauses will be used or will meet their agency's need long-term.

Figure 2 maps key categories of dispute resolution processes on a spectrum. Negotiation gives maximum process and outcome control to the parties, who may or may not be represented by agents or counsel. Mediation is a process in which an impartial mediator facilitates the negotiation. In negotiation and mediation there is no resolution unless the parties agree to it.⁹ For this reason, these processes are sometimes called “non-binding.” Once the parties agree to a resolution, by negotiation or mediation, that agreement can be enforceable as a contract by the court. Moving along the spectrum shown in Figure 2 from negotiation and mediation toward arbitration to litigation generally shifts the decision-making control of both process and outcome from the disputing parties to a third party. The third party controls the process and renders a binding or non-binding decision. Note that in arbitration, the parties may have had some input in designing the process through contractual negotiation.

9 One of the Agreements called for mediation that did not conform to the traditional impartial mediator, and four called for the mediator to render decisions – a process traditionally associated with arbitration.

Figure 2. The spectrum of dispute resolution process. Modified from Amsler et al. (2020a).



In our analysis, JPAAAs tend to include more direction on types of disputes that can be addressed using the Agreement’s dispute resolution clause, who can invoke the clause, who will pay for the dispute resolution process and the timelines surrounding the process (Table 2). Importantly, however, a high percentage of both JPAAAs and MOUAs that include dispute resolution clauses (96% and 82% respectively) include processes for resolving disputes. Sixty percent of these Agreements include a tiered approach to resolving disputes. Most commonly, these tiered approaches began with negotiation, escalating to mediation only after less formal processes were unable to resolve the dispute. The dispute resolution clauses included in the Agreements attempted to balance the need to resolve conflicts in a timely manner – often including timelines to seek additional help (e.g., via a mediator) to resolve conflicts – with the need for autonomy. While litigation is always an option, just over one-third (36%) of the Agreements with dispute resolution clauses explicitly state that arbitration and/or litigation may be employed failing resolution via negotiation or mediation.

Dispute resolution literature suggests that these dispute resolution clauses are an important component of contracts generally, and especially multi-party agreements, as it enables parties to make proactive decisions about how disputes are resolved. The best dispute handling systems involve multiple process options that include rights-based and interest-based processes;¹⁰ the ability for parties to choose among processes; participation that is voluntary, confidential and assisted by impartial neutrals; transparency and accountability of process;¹¹ and education and training of stakeholders on the use of the process options (Ury et al. 1988; Costantino and Merchant 1995; SPIDR 2001; Amsler et al. 2020b).

Despite the benefits of dispute resolution clauses, interviews with water managers and lawyers involved in drafting water management agreements indicate that dispute resolution clauses – even those with explicit and encompassing clauses – are not commonly used in practice (see Box 1 for specific examples). Indeed, agencies sometimes bypass the dispute resolution processes laid out in the agreement entirely or undertake them only nominally as a matter of process prior to litigation.

There are a variety of reasons that dispute resolution clauses might be included in an agreement and yet never used. First, dispute resolution clauses may be included in initial agreements primarily for symbolic purposes. For example, dispute resolution clauses can be a means of signaling to parties signing onto the agreement that the group intends to work collaboratively and resolve disputes internally or without litigation, whenever possible. The credibility of the clause’s intention will correlate with the basin’s history of collaboration overall. In the alternative, including such a clause may have a “calming effect” on parties that have not worked together in the past or have a history of conflict, by providing them with clear triggers and processes for ensuring their interests and concerns are heard. In agreements where dispute resolution clauses are used for these purposes, their mere presence

10 Interest-based processes focus on a range of basic human, economic and social needs and concerns that the parties can address in flexible ways; rights-based dispute resolution requires a neutral third-party to apply agreed-upon rules from law, policy or contract to a set of facts to determine who prevails (Ury et al. 1988).

11 Transparency of process is crucial in mediation – i.e., parties to the process should understand the process for decisions. However, the content of proceedings may be protected by privilege and confidentiality of negotiation and mediation, as well as arbitration.

in the agreement may be sufficient to meet these goals and actual use of the clause may be unnecessary as parties develop or strengthen working relationships over time.

Second, incorporating well-crafted, thoughtful dispute resolution clauses into agreements requires consideration of a variety of factors including long-term relationships, the ability of all parties to make agreements and enforceability. Facilitating conversations on these topics takes time, skill and, in some cases, education to fully appreciate the requirements and benefits of dispute resolution (Forester 2009; Innes and Booher 2015). Given the tight timelines for GSA formation, GSAs may not have had sufficient time to craft or agree on a dispute resolution clause for their GSA. In such cases, agencies may have chosen to use “boilerplate” language from another agreement or to exclude a dispute resolution clause from their agreement completely.

Relatedly, the dispute resolution clauses may prove to be too narrow, inadequate for addressing disputes that arise or place undue burdens on either the parties involved in disputes or the parties supporting the dispute resolution process more broadly. If and when disputes arise that parties believe to be inadequately addressed by the stated dispute resolution procedures, those parties may determine there is little use in invoking them.

Third, as agreements age and staff change, there may be a loss of institutional knowledge about the dispute resolution clause or its processes. Meaning that by the time a dispute arises, no one remembers there is a process previously agreed to. Fourth, there can be general mistrust for processes people aren't familiar with. Agencies or individuals unfamiliar with mediation or other ADR processes may be reluctant to devote their precious time and resources to such processes.

Finally, in some circumstances, settling a dispute through an alternative process may be viewed as a weakening of position, especially if local court rules do not require an attempt at using mediation before trial. Individuals or agencies may feel that they are more likely to achieve a better outcome via litigation or their constituents may view settling a dispute as compromising their position. Litigation may be especially appealing if a public, evaluative process is sought, if a legal precedent is desired or continuing jurisdiction of the court is important.

In other cases, parties may choose to not include dispute resolution clauses in their agreements altogether. Again, there are likely many reasons for this decision. First, individuals or agencies may feel that ADR processes are not in their agency's best interest and that litigation represents their best option. Thus, it is unnecessary or disadvantageous to include a dispute resolution clause in their agreement. Indeed, as discussed previously, there are a variety of circumstances where litigation may be warranted or necessary.

Second, agencies may feel that formal dispute resolution clauses are unnecessary where they have sought to incorporate elements of dispute mitigation or dispute resolution processes into other areas of their agreement. For example, agencies may have developed a voting structure that they feel serves functionally as their dispute resolution process. Third, and closely related may be other conflict mitigation measures that place certain topics or issues outside the scope of the agreements. For example, in the context of SGMA, a JPAA or MOUA may explicitly provide that the combined entity cannot affect parties' groundwater rights, make any party liable for expenses or debts incurred by the other parties, etc. A sufficient number of such exceptions and limitations may obviate the perceived need for a dispute resolution process by taking the most contentious issues off the table ex ante. Overall, the absence of a dispute resolution clause in an agreement may not be because agencies forgot it, did not have time to negotiate it by the GSA formation deadline, or did not see the value of a dispute resolution clause; rather, it may be that they had concerns about including it, deemed it unnecessary or incorporated elements of dispute mitigation or resolution processes into other areas of their agreement.

Fourth, agencies may be concerned that discussing the issue of conflicts and conflict-prone topics may only serve to bring them to the fore, particularly in regions where agencies have a long history of working together. Finally, in basins where agencies had minimal or contentious prior relationships, reaching consensus on dispute resolution processes may not have been possible under the tight timelines for GSA formation.

Box 1. Dispute Resolution Processes: Don't Just Write Them Down

Provisions for dispute resolutions processes have appeared in the agreements of other California JPAs in the water and wastewater sectors. That has not guaranteed their use, however.

The South Orange County Wastewater Agency (SOCWA) is a JPA with 10 municipal and special-district members. The SOCWA JPA which was entered into in 2001 contains a detailed arbitration clause stating that “any controversy of claim between any two or more parties to this Agreement... shall be submitted to and determined by arbitration.” Despite the plain language of the agreement, four of the parties went to litigation in May 2017 and spent two years and millions of dollars before reaching a settlement in May 2019. The arbitration provision in the JPA was never invoked.

The JPA between East Valley Water District and the municipal water department of the City of San Bernardino dates back to 1957. The original agreement contained an arbitration clause. A 1980 amendment to the agreement rescinded the arbitration clause. Years later, lawsuits were initiated over East Valley's plan to construct its own water reclamation facility, which would have reduced wastewater flows (and payments) to the city's water department. The litigation reached settlement in 2017, after extensive costs to each party. As part of the settlement agreement in that case, the JPA itself will be dissolved.

The Santa Ana Watershed Project Authority (SAWPA) is a 50-year-old JPA, formed in 1969 and currently composed of five member agencies. The JPA contains an arbitration provision. Despite many disagreements during SAWPA's half-century of financing and building water and wastewater conveyance and treatment facilities in the upper Santa Ana River watershed, many of them involving millions of dollars and significant water resource implications, the arbitration provision has never been used.

Writing a dispute resolution process into your JPAA or MOUA can be important, for reasons noted elsewhere in this report. Just having process language on paper, however, is clearly not enough if it can be forgotten, overwritten or ignored in practice. As multi-entity GSAs look to the future and proceed through the potentially contentious processes of planning for and pursuing sustainability, it is worth not only having dispute resolution procedures but also turning to them if and when the need arises.

Contents of dispute resolution clauses. In addition to the complexity of decisions about whether to include a dispute resolution clause in an agreement or not, the range of dispute resolution clauses and their complexity varies significantly across the Agreements. Some dispute resolution clauses are vague, requiring only that “The Parties shall work collaboratively and in good faith.” By contrast, other Agreements outline clear processes, timelines and financing mechanisms for resolving disputes.

While both examples provided above may meet individual agency goals and requirements with respect to dispute resolution, Box 2 provides a sample dispute resolution clause that may be a helpful starting point for agencies developing their own dispute resolution clauses in coordination agreements under SGMA and beyond. Note: this dispute resolution clause is not complete and is in no way intended to fit the goals of all agencies. It should be modified to accommodate the specific governance structures, goals and groundwater conditions in each basin. Agencies may find it helpful to consider the following questions when developing or modifying an existing dispute resolution clause. In Box 2, the language addressing each of the questions outlined below are called out in blue text.

Questions to consider when drafting a dispute resolution clause

1. What are the process goals?
 - a. Consider what disputes the process aims to address – all disputes arising under the GSA or GSP or only a subset.
 - b. Consider inclusivity and transparency of the process, cost efficiency for parties and the GSA(s), timeframes and other factors important to your agency(ies).
 - c. Other potential objectives include dispute prevention, enhanced relationships, procedural and substantive fairness, legal compliance, durability of resolution and organizational improvement.
2. Who can initiate and participate in the dispute resolution process?
 - a. Consider what parties can initiate the dispute resolution process – is it only parties to the agreement or can external parties invoke it? There are pros and cons to both choices, so discussing this in advance will ensure thoughtful consideration.
3. What processes are used to make decisions related to dispute resolution and what information is necessary?
 - a. What is the process for selecting a mediator, facilitator, lawyer or other impartial party?
 - b. Consider including a range of processes beginning with internal negotiations and escalating based on clear timelines. Doing so may help to facilitate resolution of conflicts under tight timelines and avoid empty negotiations (JAMS 2019).
4. Who pays for the dispute resolution process?
 - a. Consider who will pay for the mediator, facilitator, lawyer or other impartial party. Will it be paid for by the disputing parties, the GSA(s) or through a state-funded program?
5. Do you have a means to assess whether the outcome of the dispute resolution process were successful?

Box 2. A Draft Dispute Resolution Clause.

The blue text notes indicate how each of the preceding five questions are incorporated into the dispute resolution language.

In the event that any dispute [Q1: Provides instruction on what disputes can be addressed. Additional process goals, while not explicit should be subject to discussion.] arises among the Members relating to (i) this Agreement, (ii) the rights and obligations arising from this Agreement, (iii) a Member proposing to withdraw from membership in the Agency, or (iv) a Member proposing to initiate litigation within the Basin or the management of the Basin, the aggrieved Member or Members proposing to withdraw from membership shall provide written notice to the other Members of the controversy or proposal to withdraw from membership [Q2: Provides instruction on who can initiate and participate in the process.]. Within forty-five (45) days after such written notice, the Members shall attempt in good faith to resolve the controversy through informal negotiation [Q3: Describes a series of processes for dispute resolution, beginning with negotiation. Also includes a timeline for process stages.]. If the Members cannot agree upon a resolution of the controversy within forty-five (45) days from the providing of written notice specified above, the dispute shall be submitted to mediation prior to commencement of any legal action or prior to withdrawal of a Member proposing to withdraw from membership. The mediation shall be no less than a full day (unless agreed otherwise among the Members) and the cost of mediation shall be paid in equal proportion among the Members [Q4: Provides instruction on who will pay for dispute resolution processes.]. The mediator shall be either voluntarily agreed to or appointed by the Superior Court upon a suit and motion for appointment of an impartial mediator [Q3a: Provides a clear process for choosing an impartial mediator.]. Upon completion of mediation, if the controversy has not been resolved, any Member may exercise all rights to bring a legal action relating to the controversy or withdraw from membership as otherwise authorized pursuant to this Agreement. The Agency may, at its discretion, participate in mediation upon request by a stakeholder [to be defined by the parties to the Agreement] concerning a dispute alleged by the stakeholder concerning the management of the Basin or rights to extract groundwater from the Basin, with the terms of such mediation to be determined in the sole discretion of the Member Directors [Q2: Allows third-party participation in the dispute resolution process].

Note: This above dispute resolution clause is not intended to serve as an endorsement or illustration of effective practice.

KEY FINDINGS AND RECOMMENDATIONS

Key Findings

Our review of the Agreements of the multi-entity GSAs found that:

- Most Agreements contain dispute resolution clauses; however roughly one-third of them do not.
- There is no difference between JPAAAs and MOUAs in terms of the likelihood of having or not having dispute resolution clauses.
- The contents and complexity of the dispute resolution clauses that are present in the Agreements differ substantially across cases.
- There are multiple reasons why multi-entity GSAs have or have not included dispute resolution clauses in their Agreements. Dispute resolution clauses can help to calm parties when Agreements are being formed between potentially contentious parties, however in such cases it can be difficult for parties to reach an agreement about the content of such a clause, particularly under tight timelines.
- In other, non-SGMA JPAs in California, even the presence of dispute resolution clauses has not necessarily resulted in their use.

Recommendations

In light of the wide variety of circumstances across the dozens of multi-entity GSAs, there may be no single set of recommendations at the GSA-scale that would fit all cases. On the other hand, viewed from a different scale – i.e., at the level of the state of California as a whole – there are some ideas that deserve consideration in light of the likelihood that many disputes will in fact arise across the 100+ groundwater basins where SGMA is being implemented. That is to say, some statewide arrangements may make sense that would not necessarily make as much sense for each individual GSA to adopt.

1. **GSAs should consider devoting time and resources to developing local-level dispute resolution processes.** Given the likelihood that disagreements among implementing agencies at the local level will occur across the high- and medium-priority basins where SGMA is being implemented, local agencies should consider an investment in dispute resolution capacity as a form of insurance. Devoting a modest amount of resources to developing dispute resolution processes will ensure these systems are available when the need arises. Deferring decisions on dispute resolution processes are likely to complicate resolution when conflicts do arise. In addition to arguing over outcomes, disputants will also need to decide processes, decisions and authorities.
2. **The State should consider developing State-sponsored programs to support alternative dispute resolution.** The State could make the dispute resolution process more efficient through a form of “risk pooling,” i.e., making dispute resolution resources available to the GSAs through a statewide program. This program could take the form of retaining a panel of ADR practitioners who agree to (a) become familiar with SGMA and with groundwater management issues and (b) serve when needed to mediate and/or arbitrate disputes within or between GSAs.

The State Water Resources Control Board has contracts in place to provide mediators and facilitators to resolve disputes and help the parties work together effectively. However, the State should consider expanding this program to make it more accessible, both in terms of resources, as well as education of users and training of neutrals on mediation of groundwater conflicts. While there are a variety of options for funding such a program, one potential model is that of a “revolving fund,” with the State providing the initial capital to establish the dispute resolution program and retain the panel of practitioners. GSAs would then pay for practitioners’ services when needed, thereby replenishing the fund and maintaining the availability of the panel for future use by other GSAs. These services could be subsidized where necessary. Development of such a model can be seen as a continuation or extension of the services provided by the State during the GSA formation and GSP development processes, when the Department of Water Resources provided funding for facilitators.

3. **The State should consider working with existing alternative dispute resolution programs to develop messaging around the value of mediation.** The U.S. Department of Agriculture and other programs currently provide funding to help growers and others avoid the long and expensive process of litigation. Working with these agencies may provide the data and tools necessary to ascribe economic values to ADR.
4. **Courts throughout California should be encouraged to redirect any complaint filings involving GSAs to ADR.** Doing so will facilitate use of dispute resolution processes in good faith.

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